

GOVERNMENT PROPOSED JURY INST. NO. 110Failure to Collect or Pay Over Tax -- Offense Charged

The indictment sets forth _____ counts or charges.

Count I charges that on or about the ____ day of _____, 19____, in the _____ District of _____, the defendant, _____, a resident of _____, who conducted a business as a sole proprietorship **1** under the name and style of _____, with its principal place of business in _____, and who, during the ____ quarter **2** of the year 19__, ending _____, 19____, deducted and collected from the total taxable wages of his [her] employees federal income taxes and Federal Insurance Contributions Act taxes in the sum of \$____, did willfully fail to truthfully account for and pay over to the Internal Revenue Service said federal income taxes withheld and Federal Insurance Contributions Act taxes due and owing to the United States of America for the said quarter ending _____, 19____.

Count II charges that * * *

All in violation of Title 26, United States Code, Section 7202.

NOTES

1Where the taxpayer is a corporation, the instruction should be modified to follow the wording of the indictment.

2 Designate appropriate quarter.

GOVERNMENT PROPOSED JURY INST. NO. 111

Statute Defining Offense -- 26 U.S.C. 7202

Section 7202 of the Internal Revenue Code provides, in part, as follows:

Any person required * * * to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall * * * be guilty [*of an offense against the laws of the United States.*]

26 U.S.C. § 7202

GOVERNMENT PROPOSED JURY INST. NO. 112

Elements of the Offense

In order to establish the offense charged in the indictment, the government must prove the following three elements beyond a reasonable doubt:

First, the defendant was a person who had a duty to collect, truthfully account for, and pay over federal income and social security taxes that the defendant was required to withhold from the wages of employees for the calendar quarter ending _____;

Second, the defendant failed to collect or truthfully account for and pay over federal income and social security taxes that the defendant was required to withhold from the wages of employees for the calendar quarter ending _____; and

Third, the defendant acted willfully.

GOVERNMENT PROPOSED JURY INST. NO. 113

Obligation to File

The government must prove that the business in question had employees to whom it paid wages.

The law requires every employer of labor to deduct and withhold income taxes from the wages paid to employees.

The law also imposes on the income of every individual a tax equal to a specified percentage of his or her wages received with respect to employment as a contribution to his or her insurance under Social Security and related programs. The employer is required under the law to collect this tax by deducting the amount of the taxes from the wages as and when paid.

Every employer therefore must deduct withholding taxes and Social Security taxes from the wages of its employees and is required to file for each calendar quarter a Form 941, Employer's Federal Quarterly Tax Return, reflecting such withholding of income and Social Security taxes and said return must be filed on or before the last day of the first calendar month following the period for which it is made. For example, a return for the first calendar quarter of a year would cover the period from January 1 through March 31 and must be filed before April 30.

26 U.S.C. §§ 3101, 3102(a) -- F.I.C.A. taxes; 3402(a) -- Withholding; 3403 -- Employer liable for tax

26 C.F.R. §§ 31.6071(a)- 1, 31.6011(a)-1 (1993)

Slodov v. United States, 436 U.S. 238, 242 (1978)

COMMENT

1 See *United States v. Porth*, 426 F.2d 519, 522 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970), for an explanation of an employer's duty and specifically the meaning of "collect."

GOVERNMENT PROPOSED JURY INST. NO. 115

Person Required To Collect,
Account For, And Pay Over Tax

In order to be found guilty of the offenses charged in the information, the defendant must have been a person required to collect, truthfully account for, and pay over withheld federal income and Social Security (FICA) taxes.

An individual is such a person if he [she] was [*an officer or employee of a corporation*] or [*a member or employee of a partnership*] or [*connected or associated with a business entity*] in a manner such that he [she] was in a decision-making role and had the authority and duty to assure that withholding taxes and social security taxes are paid and when. The test as to who is responsible and who is not ultimately becomes one of who on behalf of the employing entity had significant control over the financial decision-making process within the employment entity as would give him [her] the power and responsibility to determine who would get paid and who would not. An individual may be a responsible person regardless of whether he [she] does the actual mechanical work of keeping records, preparing returns, or writing checks.

26 U.S.C. § 7343 -- Definition of Term "Person"

Slodov v. United States, 436 U.S. 238, 245 (1978)

Caterino v. United States, 794 F.2d 1, 6 n.1 (1st Cir. 1986), *cert. denied*, 480 U.S. 905 (1987)

Godfrey v. United States, 748 F.2d 1568, 1574-75 (Fed. Cir. 1984)

Commonwealth Nat. Bank of Dallas v. United States, 665 F.2d 743, 750-51 (5th Cir. 1982)

United States v. McMullen, 516 F.2d 917, 920 (7th Cir.), *cert. denied*, 423 U.S. 915 (1975)

Monday v. United States, 421 F.2d 1210, 1214 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970)

Pacific National Insurance v. United States, 422 F.2d 26, 30, 31 (9th Cir.), *cert. denied*, 398 U.S. 937 (1970)

D'Orazi v. United States, 71-1 U.S.T.C., para. 9270, p. 86,048; 27 A.F.T.R.2d 865, 868-869 (N.D. Cal. Nov. 5, 1970)

COMMENT

1 In *Datlof v. United States*, 252 F. Supp. 11 (E.D. Pa.), *aff'd*, 370 F.2d 655 (3d Cir. 1966), *cert. denied*, 387 U.S. 906 (1967), the court cites cases for the use of the following criteria in determining whether an individual is a responsible person, (a) contents of corporate by-laws; (b) ability to sign checks on the company's bank account; (c) identity of the individual who signed returns of the firm; (d) the payment of other creditors instead of the United States; (e) the identity of the officers, directors, and principal stockholders in the firm; (f) the identity of the individuals who hired and discharged employees, and (g) in general, the identity of the individual who was in control of the financial officers of the firm in question.

GOVERNMENT PROPOSED JURY INST. NO. 117

More Than One Responsible Person

There may be more than one person connected with a [*specify, corporation, partnership, or business entity*] who is required to collect, account for, and pay over withholding taxes, but the existence of this same duty and responsibility in another individual would not necessarily relieve the defendant of his responsibility.

Godfrey v. United States, 748 F.2d 1568, 1575 (Fed. Cir. 1984)

Monday v. United States, 421 F.2d 1210, 1214 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970)

White v. United States, 372 F.2d 513, 516-520 (Ct. Cl. 1967)

D'Orazi v. United States, 71-1 U.S.T.C. para. 9270, p. 86,048; 27 A.F.T.R.2d 865, 868 (N.D. Cal. Nov. 5, 1970)

GOVERNMENT PROPOSED JURY INST. NO. 118Willfulness

The word "willfully" means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something he [she] knew the law prohibited; that is to say, with intent either to disobey or to disregard the law.

An omission or failure to act is "willfully" done, if done voluntarily and intentionally, and with the specific intent to fail to do something the defendant knows the law requires to be done; that is to say, with intent either to disobey or to disregard the law.

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1 (modified)

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

United States v. Bishop, 412 U.S. 346, 360 (1973)